

FILED

JUL 15 2019

Clerk, U.S. District Court
District Of Montana
Missoula

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ANTHONY JOE LEYVA,

Petitioner,

vs.

LYNN GUYER; TIM FOX,
ATTORNEY GENERAL OF THE
STATE OF MONTANA,

Respondents.

Cause No. CV 18-179-BLG-SPW-TJC

**FINDINGS AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE**

This case comes before the Court on Petitioner Anthony Joe Leyva's application for writ of habeas corpus under 28 U.S.C. §2254. Leyva is a state prisoner proceeding pro se.

I. Background

Leyva's petition challenges his state conviction for Burglary handed down following Leyva's guilty plea in Montana's Thirteenth Judicial District, Yellowstone County. Following review of Leyva's Petition, the Court determined the claims presented appeared to be time-barred and procedurally defaulted. Leyva was ordered to show cause as to why his petition should not be dismissed and was advised of the ways in which he might make such a showing. (Doc. 3 at 5-9). Leyva sought an extension of time to file his response; the request was granted.

See, (Docs. 4 &5.) Instead of filing his response as directed, Leyva filed a request for counsel. (Doc. 6.) Leyva also advised the Court he was having difficulty obtaining various records from the prison. (Doc. 7.) Leyva was again provided additional time to file his response. (Doc. 8.) Leyva has yet to respond to this Court's Order within the requisite time period.

II. Dismissal for Failure to Prosecute

The Federal Rules of Civil Procedure apply in a habeas action to the extent they are not inconsistent with the Rules Governing Section 2254 Cases in the United States District Courts or other applicable law. See Rule 11, Section 2254 Rules; *Mayle v. Felix*, 545 U.S. 644, 654 (2005). Fed. R. Civ. P. 41(b) authorizes the Court to dismiss an action “[i]f the plaintiff fails to prosecute” the action. The Court may dismiss a case on its own motion without awaiting a defense motion.

See, e.g., Link v. Wabash Railroad Co., 370 U.S. 626, 633 (1962); *Hells Canyon Preservation Council v. United States Forest Serv.*, 403 F. 3d 683, 689 (9th Cir. 2005).

In determining whether Petitioner's failure to prosecute warrants dismissal of the case, the Court must weigh the following five factors: “(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic

sanctions.” *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir.1986)). “The first two of these factors favor the imposition of sanctions in most cases, while the fourth factor cuts against a default or dismissal sanction. Thus the key factors are prejudice and availability of lesser sanctions.” *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir.1990).

“The public’s interest in expeditious resolution of litigation always favors dismissal.” *Yourish v. California Amplifier*, 191 F. 3d 983, 990 (9th Cir. 1999). Despite being provided adequate time, Leyva has failed to file his response. This factor weighs in favor of dismissal.

Likewise, the second factor supports dismissal. “The trial judge is in the best position to determine whether the delay in a particular case interferes with docket management and the public interest.” *Pagtalunan v. Galaza*, 291 F. 3d 639 (9th Cir. 2002). The Court cannot manage its docket if Leyva continues to delay and/or refuse to comply with Court orders. Leyva’s case has consumed judicial resources and time that could have been better spent on other matters. Therefore, this factor favors dismissal.

The third factor requires the Court to weigh the risk of prejudice to the Defendants. “To prove prejudice, a defendant must establish that plaintiff’s actions impaired defendant’s ability to proceed to trial or threatened to interfere with the rightful decision of the case.” *Malone v. United States Postal Service*, 833

F. 2d 128, 131 (9th Cir. 1987). Leyva's refusal to comply with the Court's order makes prejudice a foregone conclusion. The longer this matter sits, the more prejudice to Respondents.

The Court has considered less drastic alternatives. Alternatives may include "allowing further amended complaints, allowing additional time, or insisting that appellant associate experienced counsel." *Nevijel v. North Coast Life Insurance Co.*, 651 F. 2d 671, 674 (9th Cir. 1981). Although less drastic alternatives to dismissal should be considered, the Court is not required to exhaust all such alternatives prior to dismissal. *Id.* As set forth above, Leyva has been granted filing extensions and been provided adequate time to prepare his response. Yet Leyva has failed to respond to the Court's show cause order. At this juncture, the Court can envision no further alternatives to dismissal.

The last factor weighs against dismissal because public policy favors disposition of cases on their merits. *Hernandez v. City of El Monte*, 138 F. 3d 393, 399 (9th Cir. 1998). But in light of the other four factors favoring dismissal, the weight of this factor is slight. The Court will therefore recommend that this matter be dismissed for failure to prosecute, pursuant to Fed. F. Civ. P. 41(b), for failure to comply with the Court's order.

III. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it

enters a final order adverse to the applicant.” Rule 11(a), Rules governing § 2254 Proceedings. A COA should issue as to those claims on which a petitioner makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The standard is satisfied if “jurists of reason could disagree with the district court’s resolution of [the] constitutional claims” or “conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Where a claim is dismissed on procedural grounds, the court must also decide whether “jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

None of the claims advanced by Leyva appear to make a substantial showing that he was deprived of a constitutional right. No reasonable jurist would suggest the Court go forward with the case without Leyva’s participation. A certificate of appealability should be denied because reasonable jurists would find no reason to encourage further proceedings.

Based on the foregoing, the Court enters the following:

RECOMMENDATION

1. Mr. Leyva’s Petition (Doc. 1) should be DISMISSED under Fed. R. Civ. P. 41(b) for failure to prosecute.

2. The Clerk of Court should be directed to enter, by separate document, a judgment in favor of Respondent and against Petitioner.
3. A certificate of appealability should be DENIED.

**NOTICE OF RIGHT TO OBJECT
TO FINDINGS & RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT**

Mr. Leyva may object to this Findings and Recommendation within 14 days.¹ 28 U.S.C. § 636(b)(1). Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

Mr. Leyva must immediately notify the Court of any change in his mailing address by filing a “Notice of Change of Address.” Failure to do so may result in dismissal of this action without notice to him.

DATED this 15th day of July, 2019.

/s/ Timothy J. Cavan
Timothy J. Cavan
United States Magistrate Judge

¹ Rule 6(d) of the Federal Rules of Civil Procedure provides that “[w]hen a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail) . . . 3 days are added after the period would otherwise expire under Rule 6(a).” Therefore, since Leyva is being served by mail, he is entitled an additional three (3) days after the period would otherwise expire.